Before the

Federal Communications Commission

Washington, DC

In the Matter of **Protecting the Privacy of Customers of Broadband and Other Telecommunications Services**	WC Docket No. 16-106

Reply Comments of

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Summary

This Reply addresses two matters. First, a number of comments submitted in this proceeding make arguments that rely on claims about disclosures, defaults, and consumer choice that are not warranted by the pertinent evidence. An examination of the government's own prior experience in attempting to use mandated disclosures and default rules to achieve informed consumer choice demonstrates that these approaches have failed under conditions similar to those presented by Broadband Internet Access Service ("BIAS") providers and their customers.

Second, many commenters press the Commission to adopt the Federal Trade Commission's "notice and choice" approach to privacy. However, while the FTC's approach has addressed some of the most shocking privacy invasions (e.g., surreptitiously monitoring customers in their homes by video camera), it has not led to widespread informed consumer choice.[1] While uniformity is generally a desirable regulatory goal, the Commission's goal in this proceeding is to create conditions that will lead to informed consumer choices about the use of their information.[2] In nascent fields such as this one it is important to engage in regulatory experimentation until an efficacious approach is found. The Commission should adopt the same data-driven consumer-testing approach used by businesses today, so as to move the regulatory treatment of consumer information privacy forward.

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[1] The "notice" half of the FTC's approach is not working. Many consumers are confused about what information is collected about them, who collects it, how they collect it, who uses it, and how they use it. Lee Rainie, *The State of Privacy in America: What We Learned,* Pew Research Center, Jan. 20, 2016. The "choice" half is also not working. Knowledgeable consumers often attempt to limit the sharing and use of their information, but routinely fail to do so to the extent they desire or even mistakenly believe they have done. Michelle Madejski et al., *A Study of Privacy Setting Errors in an Online Social Network* (2012); Pedro G. Leon et al., *Why Johnny Can't Opt Out: A Usability Evaluation of Tools to Limit Online Behavioral Advertising* (2012). A recent examination of over 250 website privacy notices further demonstrates that the FTC's approach is not working. The study finds that privacy policies generally do not contain sufficient information for consumers to know what information is being collected, by whom, and for what uses, and often do not provide any mechanism by which consumers can realistically opt out of sharing their information. Florencia Marotta-Wurgler, *Understanding Privacy Policies: Content, Self-Regulation, and Market Forces*, NYU Law & Economics Research Paper No. 16-18 (2016).

[2] As noted in the press release announcing this Notice of Proposed Rulemaking, the Commission's proposal aims "to ensure broadband customers have meaningful choice" and to "give broadband customers the tools they need to make informed decisions about how their information is used by their ISPs and whether and for what purposes their ISPs may share their customers' information with third parties."

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Discussion

I am a Professor of Law and Rains Senior Research Scholar at Loyola Law School Los Angeles and have held visiting appointments at Harvard University, the University of Pennsylvania, and Cornell University. My research has examined the efficacy of various regulatory approaches used in consumer law, including mandated disclosures[3] and default settings.[4] Based on my expertise on consumer and firm responses to mandated disclosures and defaults, I have developed two new performance-based tools for regulating consumer transactions: customer confusion audits and customer consequences audits.[5] In 2015, the International Association of Privacy Professionals honored me with its Best Paper Award for my article on using customer confusion audits to, e.g., regulate consumer information privacy. Just last month, the Consumer Financial Protection Bureau proposed using customer consequences audits as part of its new payday loan regulations.[6]

My comments will first present pertinent evidence on the inefficacy of mandated disclosures and defaults in producing informed consumer choice and then describe several regulatory measures that are more likely to produce informed consumer choice. For ease of reference, I will characterize the Commission's proposed tripartite system for regulating consumer proprietary information (PI) as follows:

(1) BIAS providers may use their customers' PI in ways inherent in the smooth operation of broadband services without any consumer notice or consent;

(2) Providers and their affiliates may use their customers' PI for the purpose of marketing communications-related services without consumer consent, but must give their customers an easy way to opt out of this "communications-marketing default"; and

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[3] Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending*, 65 MARYLAND LAW REV. 707 (2006).

[4] Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 UNIV. OF CHICAGO LAW REV. 1155 (2013); Lauren E. Willis, *Why Not Privacy by Default?*, 29 BERKELEY TECHNOLOGY LAW J. 61 (2014).

[5] Lauren E. Willis, *Performance-Based Consumer Law*, 82 UNIV. OF CHICAGO LAW REV. 1309 (2015).

[6] Consumer Financial Protection Bureau, *Payday, Vehicle Title, and Certain High-Cost Installment Loans*, Docket No. CFPB-2016-0025, Proposed 12 C.F.R. § 1041.12, 1292 (Section 1041.12—Conditional Exemption for Certain Covered Longer-Term Loans of up to 24 Months' Duration) (as an alternative compliance measure for longer-term high-cost loans, requiring lenders to demonstrate a loan portfolio default rate of no more than 5% annually, or disgorge all origination fees collected over the prior year).

(3) Providers may engage in any other sharing or uses of their customers' PI beyond (1) and (2) only if the consumer first consents to opt out of this "other-parties-other-uses default" and into information sharing.

I. Government-Mandated Defaults and Disclosures Do Not Ensure Meaningful Consumer Choice.

A. Mandated Disclosures.

In an effort to ensure that BIAS providers' privacy practices are transparent, the Commission has proposed detailed consumer notice requirements. The notices must describe the types of customer PI that the provider will collect, when and to whom the provider will disclose the information, the uses to which the provider and third parties will put the information, and the consumer's rights to opt in and out of most types of information sharing and use. The proposed regulations further specify when, where, and how these notices must be given to consumers. The Commission's aim here is to inform consumers sufficiently well for consumers to exercise meaningful informed choice about the use of their PI.

Unfortunately, the Commission's proposal would require these notices to be textual, lengthy, and complex. To employ "large type" as required by the proposed regulations, the notices would need to be textual. To cover all the information that the proposed regulations require to be disclosed, the notices would need to be lengthy. To give consumers both opt-in and out-out rights for various categories of information uses and users, the notices would necessarily be complex. The evidence on the efficacy of such disclosures does not bode well for the Commission's proposal. No matter how "clear and conspicuous" to a regulator or court examining the notice outside of the context of an actual consumer purchasing and using a product or service, textual disclosures mandated by the government routinely have little or no positive impact on consumer marketplace decisions and can even lead consumers astray.[7]

Financial privacy notices present the government's most analogous experience.[8] These notices must explain, in a "clear and conspicuous" manner, what customer information a financial institution will use and share and for what purposes. Similar to the Commission's

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[7] OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014).

[8] Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 et seq.

proposal here, the notices distinguish between customer information sharing with affiliates and with third-parties. The notices also give consumers the right to opt-out of some information sharing. But when researchers measured the effectiveness of even model disclosures in helping consumers make informed choices about their personal information, they found that only about 40% of consumers were able to understand the disclosures at even a basic level.[9]

Notably, these research findings regarding financial privacy notices were made in experimental conditions, where subjects experienced few real life distractions, had nothing to do but read the disclosures and answer experimenters' questions, and were not exposed to efforts by financial institutions to undermine the disclosures. Other privacy disclosures have performed even worse on measures of accurate consumer comprehension and successful consumer use.[10] One set of researchers, who found that simplifying the language and formatting of privacy policies barely improved consumer comprehension, explains, "even the most readable policies are too difficult for most people to understand and even the best policies are confusing."[11]

Real world conditions would likely lead to even lower rates of informed consumer choice than the rates obtained in experiments, for two primary reasons.

First, consumers in the real world rarely use their limited time and attention to read and understand government-mandated notices. In a study of disclosures provided to consumers in what is likely to be one of the largest financial transactions of their lives, a home mortgage transaction, most consumers spent less than a minute reading their disclosures at closing and none appeared to use them to comparison shop among loans.[12] In a recent experiment assessing consumers' likelihood of reading privacy notices presented

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[9] Loretta Garrison, et al, *Designing Evidence-Based Disclosures: A Case Study of Financial Privacy Notices*, 46 JOURNAL OF CONSUMER AFFAIRS 204 (2012) (finding that, in a test of model privacy disclosures developed by regulators as a safe harbor, only about 40 percent of subjects were able to compare information-sharing practices of financial institutions, choose the lower-sharing bank, and give a reason that was an accurate statement about which bank shared less).

[10] Adrienne Porter Felt et al., *Android Permissions: User Attention, Comprehension, and Behavior,* SYMPOSIUM ON USABLE PRIVACY & SECURITY (2012).

[11] Aleecia M. McDonald et al., *A Comparative Study of Online Privacy Policies and Formats*, 5672 LECTURE NOTES IN COMPUTER SCIENCE 37, 52 (2009).

[12] Jeff Sovern, *Preventing Future Economic Crises through Consumer Protection Law or How the Truth in Lending Act Failed the Subprime Borrowers,* 71 OHIO STATE LAW J. 761 (2010).

on-line, the average amount of time spent on the disclosure screen was five and a half seconds. Only 2.5% of subjects spent a minute and a half on the disclosure screen, about the amount of time it would take the average reader to read the shortest (500 words) notices used in the experiment.[13] Given the amount of information the Commission's proposal requires BIAS providers to disclose to consumers, these notices will surely be in excess of 500 words.

Second, firms have a plethora of ways to sabotage mandated disclosures. Although regulations can control the format of disclosures, firms can physically and psychologically frame disclosures to ensure that consumers do not read or understand them. Paper disclosures can be surrounded by a stack of other documents and eye-catching activity in one part of a computer or other device screen can deflect attention from electronic disclosures. A one-sentence privacy notice that subjects actually do read immediately before deciding whether to reveal sensitive personal information does have a privacy-protective effect. But adding just a 15-second delay between the notice and the loading of the webpage where subjects choose whether to reveal their information eliminates the privacy-protective effect of the notice.[14] Firms can ensure that consumers sink significant time and effort into purchasing processes before receiving a disclosure, such that consumers have already exhausted their willingness to read a notice or make a considered decision about privacy.[15] Firms can exploit common misconceptions, such as the misconception that a firm with a "privacy policy" has a policy of keeping consumer information private[16] or the misconception that a government-mandated disclosure indicates that the government has

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[13] Omri Ben-Shahar & Adam Chilton, *Simplification of Privacy Disclosures: An Experimental Test* 14 (2016).

[14] Idris Adjerid, et al, *Sleights of Privacy: Framing, Disclosures, and the Limits of Transparency*, SYMPOSIUM ON USABLE PRIVACY & SECURITY (2013).

[15] For example, consumers must often select and download a device application before they can learn how much personal data it will collect about them; by that time they are likely to be committed to the purchase and will mindlessly click through the disclosure screen. Adrienne Porter Felt et al., *Android Permissions: User Attention, Comprehension, and Behavior,* SYMPOSIUM ON USABLE PRIVACY & SECURITY (2012).

[16] Ilana Westerman, *What Misconceptions Do Consumers Have about Privacy?*, PRIVACY PERSPECTIVES, June 3, 2013; Carlos Jensen et al., *Privacy Practices of Internet Users: Self-Reports versus Observed Behavior*, 63 INT'L J. OF HUMAN-COMPUTER STUDIES 203 (2005).

reviewed and approved the transaction.[17] The list of tactics firms can use to undermine mandated disclosure goes on and on.[18]

This does not mean that consumers do not want to be informed about PI practices and exercise meaningful choice.[19] The thousands upon thousands of comments from individual consumers in this very proceeding indicate the depth of consumer concern about what happens with their data. It also does not mean that consumers cannot become informed or exercise meaningful choice. Marketing can and does provide consumers with information that consumers digest and retain. Pictures and videos can speak 1000 words without the consumer having to read a single word.[20] But marketing varies with the audience and over time, frequently invokes emotional responses, and does not rely on text alone. Pitted against marketing, lengthy, complex, bland textual mandated privacy disclosures from BIAS providers to their customers have little chance of facilitating informed consumer choice.

B. Opt-Out Defaults and the Commission's Communications-Marketing Default.

In an attempt to ensure that consumers have a meaningful opportunity to make their own choices about the use of their PI for the marketing of communications-related services by BIAS providers and their affiliates, the regulations require that providers give consumers a means of opting out of use and sharing for this purpose. In effect, the default position is to permit this type of information use and sharing, but the customer can opt out of this communications-marketing default.

Research on defaults has demonstrated that they can sometimes be quite "sticky," meaning that people stay in the default position even if they would not have chosen that

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[17] Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending*, 65 MARYLAND LAW REV. 707 (2006).

[18] Additional examples may be found in Lauren E. Willis, *Performance-Based Consumer Law*, 82 UNIV. OF CHICAGO LAW REV. 1309 (2015).

[19] Jeff Fox, *85% of Online Consumers Oppose Internet Ad Tracking,* CONSUMER REPORTS, May 27, 2014.

[20] Alexander Eitel & Katharina Scheiter, *Picture or Text First? Explaining Sequence Effects When Learning with Pictures and Text,* EDUCATIONAL PSYCHOLOGY REV. (2015); Rik Pieters & Michel Wedel, *Attention Capture and Transfer in Advertising: Brand, Pictorial, and Text-Size Effects*, JOURNAL OF MARKETING (2004).

position if it had not been the default.[21] That research has also found three types of mechanisms that often operate to make defaults sticky: (1) **transaction barriers** that favor the default (including perceived or actual penalties and rewards structured to encourage consumers to stay in the default position, costly and confusing opt-out procedures, and the invisibility of the option to change the default); (2) various forms of **status quo bias** in human decision-making (loss aversion,[22] the endowment effect,[23] omission bias,[24] and procrastination[25]); and (3) implicit **advice to follow the default**.[26]

These mechanisms function most strongly when consumers are confused about their choices or have not formed strong preferences they can easily apply to the situation. Both of these conditions are likely to exist for most consumers with respect to information privacy in this context. Consumers will likely lack strong preferences they can easily apply here given that this will be the first time most are faced with choices about their BIAS providers' use of their PI. Confusion already abounds generally among consumers about information privacy.[27] Consumer confusion will likely be particularly acute here, given the complexity of the Commission's tripartite scheme, in which some uses and sharing of a consumer's PI cannot be stopped by the consumer, providers and their affiliates can use consumer PI for marketing communications-related services unless consumers opt out, and

[21] The relevant research is reviewed in Lauren E. Willis, *Why Not Privacy by Default?*, 29 BERKELEY TECHNOLOGY LAW J. 61 (2014).

[22] Loss aversion is the tendency to weigh perceived losses more heavily than perceived gains. Nathan Novemsky & Daniel Kahneman, *The Boundaries of Loss Aversion*, 42 JOURNAL OF MARKETING RESEARCH 119 (2005).

[23] The endowment effect is the tendency of consumers who perceive themselves as already having the right to something to value that thing more than if they had perceived themselves as not having a pre-existing right to it. Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 JOURNAL OF ECONOMIC BEHAVIOR & ORGANIZATION 39 (1980).

[24] Omission bias is the tendency of consumers to feel responsible for their actions but not for inaction, and thus, to avoid regret, to favor inaction over action. Jonathan Baron & Ilana Ritov, *Reference Points and Omission Bias*, 59 ORGANIZATIONAL BEHAVIOR & HUMAN DECISION PROCESSES 475 (1994).

[25] Procrastination is the tendency to delay choices and tasks that are perceived as difficult and non-urgent. William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 JOURNAL OF RISK & UNCERTAINTY 7 (1988)

[26] People often think default positions have been selected based on expert analysis and with consumers' interests in mind. Craig R. M. McKenzie et al., *Recommendations Implicit in Policy Defaults*, 17 PSYCHOLOGICAL SCIENCE 414 (2006).

[27] Alessandro Acquisti et al., *Privacy and Human Behavior in the Age of Information*, 347 SCIENCE 509 (Jan. 30, 2015).

other sharing and uses of customer PI are permissible only if consumers opt into information sharing. Further, other entities beyond BIAS providers will continue to be able to share and use consumer PI unaffected by the Commission's regulations, and many consumers are likely to have difficulty distinguishing between the entity that provides their broadband service and entities that shape other ways in which they interact with the internet, such as cellphone service providers, browser providers, and search engine providers.

BIAS providers have a financial incentive to keep consumers in the communications-marketing default position and thus will have every reason to bolster the mechanisms that might make this default sticky. Providers will have an incentive to do three things:

1. **construct transaction barriers** to favor the default, such as by structuring perceived costs and benefits to favor the default, constructing costly and confusing opt-out procedures, and minimizing the visibility of the option to opt out;
2. **frame the default and opt-out process** so as to trigger status quo biases, such as by framing the default position as a benefit with which the consumer is endowed (triggering the endowment effect), emphasizing the losses the consumer will incur if she opts out (triggering loss aversion), disclaiming any responsibility for the results if the consumer opts out (triggering omission bias), and reminding the consumer that the decision is difficult and not urgent (triggering procrastination); and
3. **advise consumers to stick with the default**.

The Commission's proposal includes a number of provisions that attempt to forestall bolstering by BIAS providers, but the proposed regulations address only transaction barriers, and do not even completely prevent providers from constructing subtle barriers to opting out. The proposed regulations prohibit providers from offering broadband services on different terms (other than those terms inherent in the consumer's position with respect to sharing her PI) to consumers who refuse to share their PI. These regulations also require providers to clearly and conspicuously disclose that consumers have the right to opt out of the communications-marketing default and to give their customers a "simple, easy-to-access," "persistently available" method to opt out "at no additional cost." These provisions aim to prevent providers from employing costs, confusion, or invisibility as a means of keeping consumers in the communications-marketing default.

Experience with analogous opt-out rights in the financial privacy context—rights that also must be explained in "clear and conspicuous" notices and provide consumers with a "reasonable means" to opt out that can be exercised at any time[28]—demonstrates that costs, confusion, and invisibility are nonetheless likely to plague the marketing-communications default the Commission has proposed.

Costs: In the financial privacy context, banks impose subtle costs and the illusion of costs. Banks warn that if a customer opts out, the bank "may need you to repeat information that you have already provided" or "may have to transfer your phone calls more often." The Commission's proposed regulations permit providers to impose comparable hassle costs on consumers; providers may "provide a brief description, in clear and neutral language, describing any consequences directly resulting from ... lack of access to the customer's PI" and may also "explain in the notice that the customer's approval to use the customer's PI may enhance the provider's ability to offer products and services tailored to the customer's needs."

Confusion: As discussed above, informed consumer choices with respect to the financial privacy default were stymied by confusion. Even comparing banks side-by-side in experimental conditions, most consumers could not understand the banks' information-sharing practices, a prerequisite for informed exercise of opt-out rights.

Invisibility: Textual disclosures of opt-out rights are considered conspicuous for purposes of the financial privacy regulations, and would be under the Commission's proposed regulations as well. BIAS providers can count on the fact that textual disclosures are effectively invisible to many consumers; even in the flurry of publicity when the financial privacy notices were first distributed to all bank customers, fewer than 35% of those surveyed recalled receiving them.[29] Indeed, consumers today are bombarded with information, and an important life skill is learning how to mentally screen out material that the consumer is not interested in. Firms can easily leverage consumers' screening skills to hide an opt-out option in plain sight.

The result of costs, confusion, and invisibility in the financial privacy context has been that although consumers generally do not like banks sharing their information with

[28] 16 C.F.R. § 313.

[29] Fred H. Cate, *The Failure of Fair Information Practice Principles*, *in* CONSUMER PROTECTION IN THE AGE OF THE 'INFORMATION ECONOMY 341, 360 (Jane Winn ed., 2006).

affiliates or third parties,[30] almost no one opts out.[31]

BIAS providers could also bolster the default in ways not addressed by the proposed regulations. Providers could frame consumers' opt-out rights as a loss, perhaps telling consumers: "You do not need to respond to this message. You can keep all the privacy rights you have now by doing nothing." Providers could use the fact that the opt-out right must be "persistently available," to encourage consumers to stick with the default through procrastination, reminding consumers that there is "no need to act now." They could explicitly recommend that consumers stick with the default. And no doubt there are many other ways they could encourage consumers not to opt out of the marketing-communications default.

The upshot in the marketing-communications default context will thus likely be little different than in the financial privacy context; many consumers will stick with the default not because they have made an informed choice about the issue, but rather due to the transaction barriers, status quo bias, and advice that often make defaults sticky regardless of the choices consumers otherwise would have made.

C. Opt-In Defaults and the Commission's Other-Parties-Other-Uses Default.

With respect to sharing and uses of customer PI beyond provider uses inherent in the smooth operation of broadband services and provider and affiliate communications-related marketing, the proposed regulations demand that BIAS providers obtain affirmative express consumer consent ("opt-in approval") before engaging in such sharing or use. In other words, the mandated "other-parties-other-uses" default is to prohibit these categories of sharing and use, and the default can only be changed by actual consumer consent.

After reading the above description of how sticky defaults can be, one might expect this other-parties-other-uses default to be sticky. However, note that this default is contrary to providers' financial interests and so they would prefer that consumers opt out of the default and into information sharing. From the provider's perspective, it is what has been dubbed

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[30] Alan Levy & Manoj Hastak, *Consumer Comprehension of Financial Privacy Notices*, INTERAGENCY NOTICE PROJECT 15 (2008) (in consumer testing, finding that respondents "do not seem to like their information being shared with nonaffiliates . . . or affiliates").

[31] John Martin, *Opting Out—or Not*, ABC NEWS, June 21, 2001 (reporting that only .5% of people opt out of the financial privacy default).

in the academic literature a "penalty" or "information-forcing" default.[32] Penalty defaults are intended to force a party that opposes the default to bring the default to the attention of the other party and negotiate for a change, thus informing the other party about the default and opportunity to opt out, or face the likelihood that the default position will stick through inertia. Thus, the Commission's goal with respect to the other-parties-other-uses default is to ensure that consumers not only have an opportunity to make deliberate, well-informed choices, but that consumers actually *do* make deliberate, well-informed choices about these types of sharing and use. Providers will, in theory, make the default visible and present arguments for why the consumer should opt out, and consumers will, in theory, then make informed decisions about these types of sharing and use of their PI.

Unfortunately, the government's most analogous experience with a penalty default opposed by the very firms that present consumers with the opt-out choice—the bank account overdraft coverage default—demonstrates that the reality is unlikely to comport with the theory behind the other-parties-other-uses default. In practice, the overdraft default was slippery, meaning that consumers switched out of the default without making an informed choice to do so. In other words, when the party that opposes the penalty default is the one that presents the choice to opt out to the consumer, penalty defaults do not lead to deliberate, informed consumer decisions.

In the early 2000s, banks were permitting their customers to spend more than the customers had in their bank accounts, for a hefty fee: in a study by banking regulators, the median negative balance on which an overdraft fee was charged was $20 and the median fee was $27.[33] Regulators were particularly concerned about the low-income consumers who were paying 90% of the overdraft fees banks collected, even though these consumers could hardly afford to be taking these very small, very short-term, very expensive loans.[34]

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[32] Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE LAW J. 87, 91 (1989); Edward J. Janger & Paul M. Schwartz, *The Gramm-Leach-Bliley Act, Information Privacy, and the Limits of Default Rules*, 86 MINNESOTA LAW REV. 1219, 1239 (2001) (dubbing penalty defaults "information-forcing defaults").

[33] Patricia Cashman, et al, *FDIC Study of Bank Overdraft Programs* V (FDIC Nov. 2008).

[34] Regulators found that the 14 percent of bank customers who overdrew their accounts five or more times per year incurred over 90% of all overdraft fees and that these consumers were more likely to live in low-income zip codes. *Id*. A prominent industry analyst estimated that 90% of all overdraft fees were paid by the poorest 10% of bank customers. *Debit Card Trap*, NY TIMES A26, Aug. 20, 2009.

Inspired by the literature on the stickiness of defaults in other contexts, the Federal Reserve Board promulgated new regulations requiring banks to obtain affirmative consumer consent to overdraft coverage before charging consumers fees for overdrafts occasioned by ATM and debit card transactions. In effect, the mandated default position was that consumers could not be charged these overdraft fees.[35] The mandated default was accompanied by requirements that banks provide their customers with notices describing the bank's ATM and debit transaction overdraft coverage and associated fees. Banks could then present their customers with the choice to opt out of the default and thus consent to overdraft coverage.

Overdraft fees on ATM and debit card transactions being an incredibly lucrative income stream for the banks, banks did present consumers with the choice to opt out of the overdraft default, repeatedly, and with marketing targeted particularly to prior high-frequency users of overdraft.[36] Consumers opted out in droves. Banking regulators estimate that by the end of 2010, just four months after the overdraft default went into effect, 45 percent of heavy overdraft users (meaning users with over 10 overdrafts in the first half of 2010) and 35 percent of moderate users (meaning users with 4 to 10 overdrafts in the first half of 2010) had opted out. Some banks were achieving opt-out rates of 66% for heavy users. By 2012, about 50% of new accountholders at large banks were opting out of the default when opening a new account.[37]

How did this happen? A close analysis demonstrates that the mechanisms that can make defaults sticky are not inherent in the fact that a particular position is the default. Rather, the pull of any position depends largely on how it and the process of opting into it are framed. The opt-out position can draw consumers when perceived and actual **transaction barriers** favor it, such as when its perceived costs and benefits are structured to encourage consumers to opt into the new position, when opting out of the default is neither costly nor confusing, and when opting out is a highly visible choice. Just as framing can favor the default, so too **framing** can favor the opt-out position, such as when the new position is framed as the position with which the consumer is endowed or when opting out

[35] 12 C.F.R. § 205.17.

[36] Andrew Martin & Ron Lieber, *Overdraft Open Season*, NY TIMES B1, Feb. 23, 2010.

[37] Consumer Financial Protection Bureau, *CFPB Study of Overdraft Programs: A White Paper of Initial Data Findings* (June 2013).

is framed as urgent. Finally, any implicit advice that might otherwise be transmitted by the default regulators have selected can be eliminated by obscuring which position is the default and the consumer can be given explicit **advice to opt out**. When firms that want consumers to opt out of a default can create or exploit actual or perceived transaction barriers, can frame how the opt-out choice is presented to consumers, and can advise consumers to opt out, firms can make defaults slippery.

As with firm efforts to make defaults sticky, their efforts to make defaults slippery are most likely to be effective when consumers are confused about their choices or have not formed strong preferences they can easily apply to the situation. The overdraft default presented exactly these conditions. The default itself is unintuitive and complex; it affects only overdrawing occasioned by ATM and debit card transactions, not paper checks or automated clearinghouse (ACH) transactions. Many banks offer their customers at least four overdraft-treatment possibilities: the default overdraft practices that come with checking accounts, overdraft practices that occur if the consumer opts out of the default, overdraft lines of credit, and links from a checking account to a savings account or credit card to cover overdrafts. Each comes with its own formula for assessing fees, and the fees, formulae, and terminology for each differ at different banks and change over time.[38]

A few examples from the government's experience with the overdraft default illustrate precisely how firms can make defaults slippery.[39] First, banks eliminated and inverted transaction barriers to favor the opt-out position. Regulations prohibit banks from providing accounts on any different terms to customers who agree to overdraft services, other than as to different terms inherent in the overdraft services themselves, but this did not prevent banks from constructing other costs and benefits that favored opting out.

For example, for customers that use on-line banking, banks placed a pop-up screen between the consumer and access to the on-line banking portal that would only close after the consumer selected something along the lines of either "yes, enroll me in overdraft services" or "no, do not enroll me in overdraft services." The pop-up screen would appear

[38] Patricia Cashman, et al, *FDIC Study of Bank Overdraft Programs* 13-19 (FDIC Nov. 2008); Susan K. Weinstock, et al, *Still Risky: An Update on the Safety and Transparency of Checking Accounts* 10, The PEW Charitable Trusts, June 2012.

[39] A more detailed review of the overdraft default may be found in Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 UNIV. OF CHICAGO LAW REV. 1155 (2013).

every time the customer attempted to access the on-line banking portal until and unless she consented to overdraft coverage, but customers who had already consented would never see that pop-up screen again.[40] Off-line, banks inundated customers with a barrage of marketing materials delivered by postal mail and email, at ATMs and inside bank branches, and, for heavy overdraft users, by telephone. One survey found that almost half of respondents who knew that they had opted out of the default said they did so at least in part to stop receiving overdraft marketing.[41]

Banks also exploited and engendered consumer confusion about how overdraft services work so as to create the perception that sticking with the default is more costly than it actually is and that opting out is more beneficial than it actually is. Of accountholders who knew they had opted out of the default, 60% said they opted out to avoid declined debit card fees (even though when a merchant declines a debit card the consumer does not incur a fee) and 66% said they opted out to avoid bounced checks (even though the overdraft default did not affect check transactions, only debit card and ATM transactions).[42]

Banks further took advantage of consumer confusion to lead consumers to inadvertently opt out of the default and "consent" to overdraft coverage. In a survey taken almost two years after the policy default became effective, most consumers who overdrew their accounts reported that they did so unintentionally and many did not realize it until they received their account statements. Over half of the consumers who reported having paid an overdraft fee on an ATM or nonrecurring debit transaction in the prior year stated that they did not realize they had consented to overdraft coverage.[43]

In addition to clever deployment of perceived and real transaction barriers, banks framed the opt-out decision to flip status quo biases to favor the opt-out position. For example, banks advised consumers to "stay protected" and not to "lose" overdraft coverage,

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[40] Ben Popken, *Banks Luring You into Signing Back Up for High Overdraft Fees*, CONSUMERIST (June 18, 2010); Phil Villarreal, *When It Comes to Overdraft Opt-In, Chase Won't Take No for an Answer*, CONSUMERIST (Aug. 6, 2010).

[41] Center for Responsible Lending, *Banks Collect Overdraft Opt-Ins through Misleading Marketing* (Apr. 2011).

[42] Center for Responsible Lending, Consumer Federation of America, & National Consumer Law Center, *Comments to the Consumer Financial Protection Bureau, Docket No CFPB-2012-0007, 77 Fed. Reg. 12031 (Feb. 28, 2012): Impacts of Overdraft Programs on Consumers* (June 29, 2012).

[43] The PEW Center on the States, *Overdraft America: Confusion and Concerns about Bank Practices* (May 2012).

implying that the opt-out position was the position with which consumers were endowed so that loss aversion and the endowment effect would favor consenting to overdraft coverage. Similarly, in presenting consumers with the physical mechanism by which they could opt out (either by checking off a box on paper or on an on-line form), banks framed overdraft coverage as the status quo and the default as a change, with choices such as "YES: Keep my account working the same with overdraft coverage" and "NO: Change my account to remove overdraft coverage." This framing also prevented omission bias from favoring the status quo, because consumers were not given the option to do nothing. To further encourage action and eliminate procrastination, banks framed the choice as one that could not be delayed. For example, notices about overdraft coverage and the choice to opt out were accompanied by marketing stating that the matter was "URGENT!" and implying that the effective date of the regulations mandating the overdraft default was a deadline for consumers to take action.[44]

Finally, banks hid any implicit advice that might otherwise have flowed from regulators' selection of no overdraft coverage for ATM and debit transactions as the default and instead advised consumers to opt out. The on-line and paper forms that banks presented to consumers did not reveal which position was the default; instead of just one tick box for "opt out of the default" or "consent to overdraft coverage," consumer were given two tick-boxes, one for "keeping" overdraft coverage and one for "changing" their accounts. In conversations with customers, bank employees and telemarketers explicitly recommended that consumers consent to overdraft coverage, and in marketing materials, banks implicitly conveyed the same advice by explaining that "the majority of our [customers] prefer" having overdraft coverage.

Although the Commission's proposed regulations place some limits on BIAS providers to prevent them from using the above tools to make the other-parties-other-uses default slippery, these limits are essentially identical to the limits placed on banks with respect to the overdraft default. Providers are prohibited from offering broadband services on different terms to consumers who refuse to share their PI, just as banks are prohibited from offering checking accounts on any different terms to customers who refuse overdraft coverage. Providers must give consumers notice about the other-parties-other-uses default

[44] Materials used by banks to frame the overdraft default are discussed further in Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 UNIV. OF CHICAGO LAW REV. 1155 (2013).

and the consumer's ability to opt out, just as banks must with respect to the overdraft default. Providers must allow consumers to consent and revoke consent to information sharing at any time, just as banks must allow consumers to consent and revoke consent to overdraft coverage at any time. None of these limits prevented banks from making the overdraft default slippery, and none are likely to prevent BIAS providers from making the other-parties-other-uses default slippery.

II. Meaningful Consumer Choice Is Most Likely To Be Achieved Through a Single No-Sharing-Or-Use Default Coupled with Regulation that Bolsters the Default and Guards against Consumer Confusion.

A. Simplify the Consumer's Decision.

One of the main reasons banks can influence customer choices with respect to both the financial privacy default and the overdraft default is because consumers find their choices confusing. So too consumers are likely to be confused about what information BIAS providers collect about them, how they collect it, who they share it with, and how they use it.[45] Consumers have limited time, attention, and expertise to devote to answering these questions. The Commission's regulations create a complex tripartite scheme in which providers can use some customer PI without giving customers the option to opt out, can use other customer PI but must give customers the opportunity to opt out, and cannot use other customer PI unless customers opt into information sharing. As with the financial privacy default that permits consumers to opt out of some sharing and use and not other sharing and use of the consumer's information, and as with the overdraft default that applies to some types of transactions and not others, this is a recipe for confusion.

Providers should be able to use consumer information in ways that consumers naturally understand they have agreed to as necessary for the smooth operation of broadband services. But for all other uses, there should be a single "no-sharing-or-use default," such that consumers' PI will not be shared or used without their consent. This would not prevent providers from marketing communications-related services to consumers—providers will simply have to do it the old-fashioned way, without use of customer PI, unless and until that customer consents. The default should be opt-in because this will function as a penalty default to some extent, in that providers will have to get

[45] Lee Rainie, *The State of Privacy in America: What We Learned,* Pew Research Center, Jan. 20, 2016.

consumers to do something affirmative, whereas an opt-out of sharing or use default would almost certainly be invisible to most consumers.

B. Bolster the Default.

A second key reason that banks can influence customer choices with respect to both the financial privacy default and the overdraft default is because banks are the ones presenting the mechanism for opting out to the consumer. This allows banks to set up subtle transaction costs to favor the position banks want consumers to be in. It allows banks to frame consumer choices in a manner calculated to invoke, negate, or flip the direction of consumer decision-making biases. It also allows banks to present the default as if it were not a default.

It would probably be impossible to prevent all uses of transaction barriers, framing, and advice in BIAS provider efforts to obtain customer consent to use and share the customer's PI. But the Commission could bolster a no-sharing-or-use default in a number of ways. First, the Commission could require that consumer consent be given to an independent third-party intermediary rather allowing providers to obtain consent directly from consumers. The third party could convey to consumers that the default with which they are endowed is no-sharing-or-use, but otherwise frame the choice in ways that are either neutral or favor the default. The Commission could also require that consumers spend several months in the default position before they can be asked to consent to information sharing, so that giving consent does not become just another tick-box that consumers mindlessly check in the process of signing up for broadband service. By starting in the no-sharing position, consumers would also be more likely to understand that this is the default and that they have the right to refuse to give consent to information sharing.

Another possibility would be for the Commission to not only require BIAS providers to provide the same services at the same price to consumers who refuse to consent to information sharing, but to require that providers give no incentives to consumers to opt out and place no barriers in the way of consumers refusing to opt out (beyond any effects on consumers that are an unavoidable result of not sharing their information). Among other things, this would require providers to be evenhanded in their marketing, meaning they would need to either ask all consumers to consent only once[46] or would need to continue to send the same marketing regardless of whether the consumer has already consented to information sharing.

C. Require BIAS Providers to Demonstrate Consumer Comprehension through Customer Confusion Audits.

The third key reason that banks can influence customer choices with respect to both the financial privacy default and the overdraft default is because banks have no incentive to eliminate consumer confusion and can even exploit it. In the context of customer PI sharing and use by BIAS providers, consumers are likely to find the situation confusing even if they face only a single simple no-sharing-or-use default. Other entities beyond BIAS providers will continue to be able to use and share consumer PI they collect, and consumers are likely to have difficulty distinguishing between the entity that provides their broadband service and entities that shape other ways in which they interact with the internet, such as cellphone service providers, browser providers, and search engine providers. The Commission's proposed regulations require that providers' notices be comprehensible, not misleading, legible, readable, and readily apparent to consumers. But a disclosure that might seem to meet these requirements to a regulator or court examining the notice might not be noticed, read, and understood by consumers in the context of actually buying or using broadband services.

To ensure that consumers understand their PI choices with respect to broadband, providers must be given an incentive to effectively inform consumers about those choices. To do this, the Commission should employ the data-driven consumer-testing techniques widely used by firms in marketing today, and require providers to provide evidence that their customers actually do understand their PI choices.[47] Providers should be required to hire neutral third-party consumer survey experts to periodically random sample the providers' customers who have opted out of the no-use-or-sharing default. These experts would perform "customer confusion audits," testing sampled customers for confusion much as experts do now in the context of false advertising litigation. Testing would assess

[46] There is some precedent for this. IRS regulations permit tax preparers to ask their customers to use their tax information for marketing purposes, but the request can only be made once. 26 C.F.R. § 301.7216-3(b)(3).

[47] This proposal is fleshed out in more detail in Lauren E. Willis, *Performance-Based Consumer Law*, 82 UNIV. OF CHICAGO LAW REV. 1309 (2015).

whether consumers who have consented to information-sharing know whether they have done so, what PI about them will be shared, which third-parties their information will be shared with, to what uses their information will be put, and how they can revoke consent if they so choose. Providers that cannot demonstrate that a substantial proportion of their customers who have consented to information-sharing know these basic facts should be prohibited from engaging in any sharing or uses that their customers do not understand.

Providers could inform their customers about these basic facts in creative ways that extend well beyond the dry, textual disclosures the Commission has proposed. Cartoons, infographics, personalized messages, and the like are bound to educate more consumers more effectively.[48] Providers could leverage their marketing departments and their ability to engage in multivariate customer testing to determine which communication methods are most effective. Comprehension rules would bring to bear on the regulatory problem the providers' greater knowledge of their own processes, greater facility with experimentation, and greater ability to adapt to changes in the environment and in technology.

The effects of customer comprehension requirements are likely to be several. Consumer comprehension would facilitate provider competition over privacy practices, forcing providers to stop collecting personally identifiable data and eliminate uses of that data when consumers do not receive sufficient value in exchange. Providers would likely limit the number of types of information, uses, and third-party sharing in which they engage—in effect, simplifying the consumer's decision problem—so as to increase the likelihood that they would pass their customer confusion audits. Lower collection levels would have positive effects on data security and identity theft. With an incentive to educate rather than obfuscate, providers are likely to find creative, cost-effective ways of informing their customers about the sharing and use of the customers' own PI. In turn, this would facilitate deliberate, informed consumer choices.

Conclusion

The Commission said it well in the notice of proposed rulemaking here: "well-functioning commercial marketplaces rest on informed consent." Regulating the

[48] Alexander Eitel & Katharina Scheiter, *Picture or Text First? Explaining Sequence Effects When Learning with Pictures and Text,* EDUCATIONAL PSYCHOLOGY REV. (2015); Rik Pieters & Michel Wedel, *Attention Capture and Transfer in Advertising: Brand, Pictorial, and Text-Size Effects*, JOURNAL OF MARKETING (2004).

marketplace to ensure that consumers are able to give or withhold informed consent for sharing and use of their PI cannot be achieved through the stale approach of notice and choice. Bringing in new regulatory tools such as defaults is the right idea, but in light of the government's experience with the bank privacy and overdraft defaults, we know that defaults alone are not enough. To prevent providers from exploiting consumer confusion and limited time, attention, and knowledge, the Commission must enact a simple system of assumed permission based on context and privacy by default for all other sharing and uses, and follow this up with regulations that bolster the default. If the Commission truly wants consumers to be informed, it must further demand that providers undergo customer confusion audits and demonstrate that customers who have opted out of the default have done so deliberately and with an understanding of what they have done.

Respectfully submitted,

/s/

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